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Supreme Court of the United States

OCTOBER TERM, 1957

No. 966

STATE OF NEW MEXICO, *Petitioner*

v.

NELSON H. BEGAY

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Constitutional and Statutory Provisions Involved	1
Question Presented	2
Statement	2
Argument	2
Conclusion	9

AUTHORITIES

Cases:

Blackbird, in re, 109 Fed. 139 (1901)	4
Browning v. United States, 6 F. 2d 801 (C.C.A. 8, 1925), certiorari denied, 269 U.S. 568 (1925)	8
County Commissioners v. Seber, 318 U.S. 705 (1943)	8
Denetclaw, Application of, 83 Ariz. 299, 320 P. 2d 297 (1958)	10
Donnelly v. United States, 228 U.S. 243 (1913)	8
Fredenberg, in re, 65 F. Supp. 4 (1946)	7, 10
State v. Began, 320 P. 2d 1017 (N.M., 1958)	9
State ex rel Irvine v. District Court, 125 Mont. 398, 239 P. 2d 272 (1952)	8
State v. Jackson, 218 Minn. 429, 16 N.W. 2d 752 (1944)	4
State v. Rufus, 205 Wisc. 317, 237 N.W. 67 (1931) ...	4
United States v. Hamilton, 223 Fed. 685 (1915)	4
United States v. Kagama, 118 U.S. 375 (1886)	4
United States v. McGowan, 302 U.S. 535 (1938)	8
United States v. Nice, 241 U.S. 591 (1916)	8
United States v. Oklahoma Gas & Electric Co., 318 U.S. 206 (1943)	8
United States v. Shoshone Tribe, 304 U.S. 111 (1938)	7
Williams v. United States, 327 U.S. 711 (1946)	4

Constitution, Statutes, Treaty:

Acts of Congress:

March 4, 1909 (35 Stat. 1151)	5
June 7, 1924 (43 Stat. 606)	7
June 28, 1932 (47 Stat. 336)	5

Page

May 28, 1941 (55 Stat. 207) 7
June 25, 1948 (62 Stat. 683) 7, 8
April 19, 1950 (64 Stat. 44) 3
June 4, 1956 (70 Stat. 249) 7

Constitution of New Mexico

Article XXI, § 2 3

Criminal Code of 1909

18 U.S.C., 1926 ed., § 548 5

Criminal Code of 1948

18 U.S.C. § 13 9
18 U.S.C. § 1151 ..... 2, 4, 7, 8, 9
18 U.S.C. § 1152 ..... 1, 2, 3, 4, 8, 9
18 U.S.C. § 1153 4

Navajo Tribal Traffic Code (Navajo Tribal Council Resolutions, vol. IV, pp. 74-82) 9
Treaty of June 1, 1868 (15 Stat. 667) 3
United States Code (other than Criminal Code)
25 U.S.C. § 311 4

TEXTS, MISCELLANEOUS:

Cohen, Felix S., *Handbook of Federal Indian Law*, United States Government Printing Office, 1941 .. 5
Corpus Juris Secundum, vol. 28, "Easements," § 1 7
House Report No. 204, 80th Congress, 1st Session .. 7

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions set forth in the petition for writ of certiorari are adopted herein, and supplemented as follows:

18 USC § 1152 (62 Stat. 757)

> "Except as otherwise expressly provided by law the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively. June 25, 1948, c. 645, 62 Stat. 757."

QUESTION PRESENTED FOR REVIEW

The statement of the question presented is set forth in the petition for certiorari is adopted herein, viz.:

1. Whether a Navajo Indian, by virtue of his race or status, is immune from prosecution in the Courts of New Mexico for such offenses as driving while intoxicated, driving after revocation of driver's license, and being involved in an accident while driving when intoxicated, committed by him while using a state highway within the exterior boundaries of the Navajo Reservation.

STATEMENT OF THE CASE

The Statement of the Case set forth by the petitioner is adopted herein in its entirety.

ARGUMENT

The first reason alleged by the State of New Mexico why this court should issue a writ of certiorari appears to be true, viz.: that the Supreme Court of New Mexico has decided a Federal question of substance not heretofore determined by the Supreme Court of the United States. The second reason alleged by the State, that said Federal question should be settled by the Supreme Court of the United States, however, has no merit.

The Federal statutes defining "Indian Country" (18 U.S.C. § 1151) and declaring exlusive Federal jurisdiction over crimes committed by Indians in such country (18 U.S.C. § 1152) are so clear and so patently conclusive against the State's contentions as to require no further judicial construction.

The Criminal Code of the United States (18 U.S.C. § 1151) defines "Indian country" as including:

> ". . . all land with the limits of any Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation . . ."

The land on which the Begay's offenses, if any, occurred, is within the limits of the Navajo Indian Reservation in New Mexico, as established by the Treaty between the United States of America and the Navajo Tribe of Indians signed June 1, 1868, and proclaimed August 12, 1868 (15 Stat. 667).

The Navajo Indian Reservation in New Mexico is under the jurisdiction of the United States government. New Mexico Constitution, Article XXI, § 2; Act of April 19, 1950 (25 U.S.C. §§ 631-640); consequently, it is "Indian country" within the meaning of the Federal Criminal Code.

Section 1152 of the Federal Criminal Code (18 U.S.C.) states:

> "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

> "This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

It has been uniformly held by the Federal courts that Federal jurisdiction over offenses committed by or against Indians in Indian country is exclusive,[1] and not concurrent with State jurisdiction. *United States* v. *Kagama*, 118 U.S. 375 (1886); *Williams* v. *United States*, 327 U.S. 711 (1946). This rule applies not only in cases of the "ten major crimes" (see 18 U.S.C. § 1153), but in all criminal cases—misdemeanors as well as felonies. *In re Blackbird*, 109 Fed. 139 (1901); *United States* v. *Hamilton*, 233 Fed. 685 (1915); *State* v. *Rufus*, 205 Wisc. 317, 237 N.W. 67 (1931); *State* v. *Jackson*, 218 Minn. 429, 16 N.W. 2d 752 (1944).

The State of New Mexico now contends, however, that the grant to it by the Secretary of the Interior pursuant to 25 U.S.C. § 311 of permission to open and establish Highway 666 across the Navajo Indian Reservation conferred jurisdiction on the State courts to enforce the New Mexico traffic code against Indians, notwithstanding the express inclusion in 18 U.S.C. § 1151, quoted above, defining Indian country, of rights of way running through Indian reservations. The

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[1] The Federal jurisdiction is exclusive of State jurisdiction, but concurrent with Tribal jurisdiction. Note the exception in 18 U.S.C. § 1152 as to "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe."

basis of the State's contention seems to be that this grant of permission extinguished Indian title.

The tort is, however, that title to the land on which Begay's alleged crimes were committed is immaterial:—

Prior to 1948, "Indian country" was not defined in any Federal statute, although the term was used in numerous sections of the United States Code.[2] Section 328 of the United States Criminal Code of 1909 (35 Stat. 1151, 18 U.S.C., 1926 ed., § 548) stated in part as follows:

> ". . . And all such Indians committing any of the above-named crimes against the person or property of another Indian or other person within the boundaries of any State of the United States and *within the limits of any Indian Reservation*, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States:" [Emphasis supplied]

By the Act of June 28, 1932 (c. 284, 47 Stat. 336) the phrase italicized in the above quotation was amended to read:

> ". . . on and within any Indian reservation under the jurisdiction of the United States Government, including rights of way running through the reservation . . ."

In footnote 9 on page 358 of the *Handbook of Federal Indian Law*, Cohen quotes a memorandum of the

[2] See Felix S. Cohen, Handbook of Federal Indian Law, p. 6.

Solicitor of the Department of the Interior interpreting the amended phrase, as follows:

> ". . . it is my opinion that the amendment should be given its apparent and normal meaning; namely, that the specific reference to rights-of-way was intended to provide for Federal jurisdiction overall rights-of-way running through any Indian reservation . . .
>
> ". . . the amendment was intended to include within Federal jurisdiction all rights-of-way because of the previous division of jurisdiction over rights-of-way in Indian reservations. Prior to the passage of the amendment the courts had concluded that rights-of-way to which the Indian title had not been extinguished remained part of the reservation and within Federal jurisdiction, whereas other rights-of-way to which such title had been extinguished were subject to State jurisdiction. A court would presume that in view of this state of the law any amendment referring to rights-of-way generally would be intended to provide a uniform rule . . .
>
> "Moreover, it would be presumed by a court that this Department and Congress would have been concerned to do away with the unsatisfactory situation resulting from the uncertain status of jurisdiction over rights-of-way on Indian reservations. This would be in conformity with the basic principle of statutory construction that legislation is intended to correct existing evils. The evil in this instance was the uncertainty and confusion resulting from the fact that on each reservation there were a number of rights-of-way, whose ownership status depended on different statutes and regulations and the title to which could be definitely ascertained only through judicial statement, and that, although the title thereto had been determined, there was still the administrative

difficulty arising from differences in jurisdiction over small strips of territory."

When the Criminal Code of the United States was completely revised (Act of June 25, 1948, c. 645, 62 Stat. 683) it was decided to define "Indian country" for purposes of Federal criminal jurisdiction, basing the definition on existing judicial decisions and statutes, of which the amendment of June 28, 1932, *supra*, was one.[3] Consequently, the phrase, "including rights-of-way running through the reservation," was carried forward into the present 18 U.S.C. § 1151.

Thus, it is quite immaterial whether or not the grant of permission by the Secretary of the Interior to the State of New Mexico to open and establish Highway 666 through the Navajo Treaty Reservation extinguished Indian title.[4] The very purpose of mentioning "rights-of-way running through the reservation" in 18 U.S.C. § 1151 was to assert Federal jurisdiction regardless of title status.

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[3] See Reviser's Note to 18 U.S.C.A. § 1151. This note is taken verbatim from House Report No. 304, 80th Congress, 1st Session.

[4] Actually, the grant did not extinguish the Indian title. Indian title is equivalent to beneficial ownership, which extends to mineral as well as surface rights. *United States* v. *Shoshone Tribe*, 304 U.S. 111 (1938). The permission granted by the Secretary of the Interior to establish Highway 666 across the Navajo Indian Reservation amounted at most to an easement, which is defined as "a right or advantage which one has in the lands of another, it is distinct from the ownership of the land to which it is attached." 28 Corpus Juris Secundum, "Easements," § 1, p. 623. See *In re Fredenberg*, 65 F. Supp. 4, 6 (1946). The permission granted to New Mexico did not even give the State exclusive control of the land surface within the right of way. Congress provided that maintenance work should be done by the Secretary of the Interior using Navajo Tribal funds and Indian labor so far as possible. Act of June 7, 1924 (43 Stat. 606); amended, May 28, 1941 (55 Stat. 207); repealed, June 4, 1956 (70 Stat. 249).

The State, however, contends further that the grant of permission to open and establish Highway 666, made April 29, 1926, conferred upon it a vested right to jurisdiction over Indians, which could not be taken away by subsequent legislation of Congress. See Petition, page 9.

This contention is neither novel nor sustainable. It was raised rather more forcefully than now in the dissenting opinion in *State ex rel Irvine* v. *District Court*, 125 Mont. 398, 239 P.2d 272 (1952), where the majority repudiated it. Federal jurisdiction over Indians' crimes is not dependent on the ownership status of the land where they are committed. *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913); cf. *United States* v. *Nice*, 241 U.S. 591 (1916). And even where Congress has laid aside, or never had, jurisdiction over Indians' crimes, it can retake jurisdiction by unilateral action without State consent. *Browning* v. *United States*, 6 F. 2d 801 (C.C.A. 8, 1925), certiorari denied 269 U.S. 568 (1925); *United States* v. *McGowan*, 302 U.S. 535 (1938). Cf. *County Commissioners* v. *Seber*, 318 U.S. 705 (1943). Even if New Mexico got jurisdiction in 1926 over Indian traffic offenses on Highway 666 within the Navajo Indian Reservation by virtue of the permission given by the Secretary of the Interior to open and establish this road, New Mexico lost this jurisdiction when sections 1151 and 1152 of title 18 of the United States Code (quoted above) were enacted in June 25, 1948.[5]

[5] Since *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943) was decided prior to enactment of the Criminal Code of 1948, it has lost whatever bearing it ever had on the jurisdictional status of highway rights-of-way across Indian lands. See page 10 of Petition.

One further issue attempted to be raised by the State of New Mexico requires comment. It is stated on page 8 of the Petition for Certiorari that Navajo Indians may engage in drunken driving and other highway offenses with impunity within the Navajo Indian Reservation. On page 12 it is stated that the decision which is sought to be reviewed by certiorari grossly jeopardizes the lives and limbs of all highway users. These statements are supported neither by evidence in the record nor by facts outside the record. Actually Navajo Indians within the Navajo Indian Reservation are held to observance of the New Mexico Traffic Code by the Federal Assimilative Crimes Act 18 U.S.C. § 13) and to observance of their own Tribal Traffic Code (Navajo Tribal Council Resolutions, vol. IV, pp. 74-82) by the Tribal police. The Navajo Indian within the Navajo Reservation, because of concurrent Federal and Tribal jurisdiction is policed by at least twice as many law enforcement officers as the non-Indian citizen of New Mexico. The suspicion is strong that the vigorous prosecution of this case by New Mexico authorities is not because of danger to the travelling public, but because of the substantial loss of revenue to the State from traffic fines it cannot now collect under the ruling of its Supreme Court.

CONCLUSION

The plain language of sections 1151 and 1152 of title 18, United States Code, so clearly forecloses State jurisdiction over crimes committed by Indians within Indian Reservation that they need no explanation by this Court. A lower Federal Court and the Supreme Court of Arizona have considered identical questions to the one involved in *State* v. *Begay*, 320 P.2d 1017,

now sought to be reviewed, and have come to identical answers with the Supreme Court of New Mexico. *In re Fredenberg*, 65 F. Supp. 4 (1946); *Application of Denetclaw*, 83 Ariz. 299, 320 P.2d 297 (1958).

The petition for a writ of certiorari should be denied.

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